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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 75-65

INGLEWOOD RESIDENTS' PROTECTIVE ASSOCIATION, et al.

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Petitioner, Inglewood Residents Protective Association (IRPA), prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal (Second Appellate District) of the State of California rendered in this proceeding on January 15, 1975 which became final on April 16, 1975.

Opinions Below.

The California Supreme Court denied a Petition for hearing on April 16, 1975. This denial is unreported and is set forth in Appendix C attached hereto. The (second) opinion (upholding the trial court judgment) of the Court of Appeal is also unreported and is attached as Appendix B. The (first) opinion (reversing the trial court judgment) of the Court of Appeal is reported in 6 ERC 1235. The trial court judgment of August 15, 1972, (granting dismissal by summary judgment on the pleadings) is not reported and is attached as Appendix A.

Jurisdiction.

This Petition for Certiorari is filed less than 90 days from April 16, 1975, the date hearing was denied by the California Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

The trial court's summary judgment on the pleadings, in the case at bar, dismisses the "class action" of the association Petitioner (that has standing to maintain the action) against the respondent City, operator of the Los Angeles International Airport (LAX). The class action seeks monetary and nonmonetary relief, in the form of injuction, declaratory relief and damages for nuisance, trespass, negligence, assault and breach of contract and just compensation for inverse condemnation and constitutional damaging, from noise emanating from the airport. The class action was dismissed on the basis that claims under these theories require individual treatment, hence class action is not available as a matter of law. The questions thereby arising are:

1. Is the denial of class action treatment in the case at bar a denial of due process and equal protection of the law?
2. Should the doctrine of Griggs v. Allegheny, (1962) 369 U.S. 84, be reviewed in light of developments subsequent to 1962?
3. Is Constitutional "Just Compensation" denied when "group redress" is denied for "group wrongs"?
4. Does the City of Los Angeles have extrajurisdictional power or liability because of its appropriation of private airspace over the City of Inglewood?

Constitutional and Statutory Provisions Involved.

The Constitution of the United States Preamble provides: "...to insure domestic tranquility...."

The U.S. Constitutuion, Art. 1, Sec. 8 provides: "Congress shall have the power to regulate commerce among the several States."

The U.S. Constitution, Fourteenth Amendment, provides: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

The Federal Aviation Act of 1958, 49 USC 1301 et seq. FAR 91.79 thereunder provides: except when necessary for takeoff or landing, no person may operate an aircraft over congested areas below an altitude of 1000 feet over the highest obstacle.

Federal Aid for Public Airport Development Act, 49 USC 1101, FAR, §§151.21, 151.25 and 151.26 thereunder provides, in part: that to obtain Federal aid, the airport must submit a request on Form FAA 1623 and must state in its application:

"...all of the property interest that he holds in the lands to be developed or used as part of, or in connection with, the airport as it will be when the project is completed. Each project application contains a covenant on the part of the sponsor to acquire, before starting construction work, or within a reasonable time if not needed for the construction, property interests satisfactory to the Administrator in all the lands in which it does not hold those property interests at the time it submits the application...."

"Each sponsor must submit with his application a written statement specifying what consideration has been given to the interest of all communities in or near which the project is located. This statement must contain the substance of any objection to, or approval of, the proposed project made known to the sponsor by any local individual, group or community."

National Environmental Policy Act 42 USC 4321 et seq. Noise Control Act of 1972, 42 USC 4901 et seq.

Statement of Case.

The case at bar was instituted in 1969 shortly after the City of Los Angeles (Respondent) opened a new (LAX) runway for general use. The Association (Petitioner) alleges it was constructed under a contractual commitment by the City of Los Angeles, that the runway could be used for limited purposes only (emergency landing). It was constructed with funds from Federal grants which were conditioned on sufficient airspace acquisition by the City of Los Angeles. It was constructed after commitment from its aircraft operator lessees of $300,000,000 for expansion and acquisition of air easements. The Association, a duly incorporated California nonprofit corporation, expressly franchised with powers to pursue the instant action for Inglewood residents and homeowners, in its class action, seeks redress for homeowners and residents of the City of Inglewood. Inglewood abutts Los Angeles. The LAX Airport is constructed in close proximity to the Inglewood/Los Angeles border. The Airport runways and facilities are so positioned to cause aircraft using the Airport to fly directly over the congested heavily populated Inglewood residential areas emitting noise levels which cause personal injury to members of the class and interfere with the use and enjoyment by the class members of their residences, schools, hospitals, churches and public buildings and facilities and rendering them useless for their purposes depriving the class members of life, liberty, equality and property.

The complaint alleges, in each count, that:

"The United States Constitutuion Preamble recites as one of the purposes for which the Constitution is promulgated '...to insure domestic tranquility...'" Further, it alleges that:

"(a) The Commerce Clause of the Constitution of the United States must be interpreted to promote, not defeat, this stated purpose:

"(b) The Fifth, Ninth and Fourteenth Amendments to the Constition of the United States must

be interpreted to promote, notdefeat this purpose. ....joinder of all members is impractical and the failure of this Court to permit a class action in this instance will provide to the defendants herein an immunity to the causes of action as herein stated and thus deprive the plaintiff and members of the class represented by the plaintiff of due process of law in violation of the Fourteenth Amendment ot the U.S. Constitution which provides, in essence that no State shall deprive any citizen of the United States of life, liberty or property without due process of law... ....Interpretations of Federal or State or City law, statutes, ordinances, rules or regulations in contravention of the Preamble of the United States Constitution and Article I, Section 1 of the Constitution of the State of California, an interpretation of the laws of the United States, State of California, City of Los Angeles, or City of Inglewood which give priority to the right to recover for damage to property over the right to recover for damage to persons is unconstitutional and unenforceable to the extent that such interpretations of said laws, statutes, ordinances, rules or regulations by the State judiciary deprive citizens of the United States of life, liberty or property without due process of law and to the extent that such judicial action denies such citizens equal protections of the laws of the United States. ...At all times mentioned herein, California Government Code, §§815, 830, 50470 and 50474(i); Code of Civil Procedures, §§367, 369, 373.5, 382, 389, 431, 731(a) and (b), 1060, 1061, 1238, 1248(a) and 3482; Los Angeles City Charter, Article XXIV, §238, et seq.; California Constitution, Article I, §14; Civil Code §§1001, 3482; Public Utilities Code §21002; FAA Regulations 24 (12, 434(a)); FAA Act of 1958, §601(a), 603, 604 and 605; State Aeronautics Act, Division 9, §§21402 and 21403... Defendants are applying said statutes, ordinances, City Charter and Constitutional provisions, and FAA Regulations to plaintiff's detriment." [Quoted from complaint]

The trial judge granted summary judgment on the pleadings dismissing the Association's effort for

class action redress for the following reasons: DECLARATORY RELIEF--Insufficient as a class action; DECLARATORY RELIEF AS TO SUBCLASS--Improper for judicial relief; INVERSE CONDMENATION-"The remedy does not lend itself to general award for community damage or to cure some ill caused to a group by a broad damaging or taking;" NUISANCE-"No reason to consider seriously the allowance of class action relief or damage allegedly suffered by way of property loss or personal injuries;" TRESPASS--"The relief is not available to class action;" UNCONSTITUTIONAL DAMAGING--"Other relief is available;" BREACH OF CONTRACT--"This remedy is not available for class treatment;" ASSAULT--"The remedy for assault to persons in this manner is not available for class treatment;" NEGLIGENCE--"Remedy for negligence is not available for class action;" INJUNCTION--"If injuctive relief is available, it can be obtained through individual plaintiffs."

On review, the Appellate Court, (in its first decision) reversed the trial court, holding that: the trial court's judgment is appealable, the Association has standing to maintain this action; the action is proper for class action treatment in that common questions of law and fact are sufficiently pervasive to permit class action and the maintenance of a class action would be advantageous to the judicial process and the courts and the class is sufficiently ascertainable. In so ruling, the Appellate Court held that plaintiff's pleadings satisfied the requirement for class action treatment under California law--class action entitlement are set forth in California Civ. Proc. Code, §382. The requirements under California law for class action treatment are twofold: that there be a well defined community of interest and an ascertainable class.

Thereafter, the California Supreme Court granted hearing on application of the City of Los Angeles. Pending hearing, the California Supreme Court issued its decision in City of San Jose v.

Superior Court, 12 Cal 3d 447, 115 Cal Rptr. 797, holding that because land is unique--class action is not available for inverse condmenation or nuisance actions. Without oral argument on the hearing theretofore granted in the case at bar, the Supreme Court remanded the matter to the Appellate Court for determination in accord with its San Jose decision.

On rehearing, the Appellate Court, following the direction of the California Supreme Court, amended its prior decision, holding that "if inverse condemnation and nuisance require individual treatment so do each of the other claims:-in light of the decision in San Jose, we hold that the Association cannot maintain this suit as a class action." Petitioners' petition to the Supreme Court of the State of California, on appeal from the Second Appellate District's decision, and its petition for oral argument on the hearing theretofore granted by the Supreme Court of the State of California, were denied.

PRIOR RAISING OF FEDERAL QUESTIONS.

Federal questions raised by the underlying pleadings was necessary to determination of the motion for summary judgment on the pleadings and such judgment could not have been given without deciding it. The applicability of the U.S. Constitutional provisions have been raised at each stage of this litigation: Trial Court, Court of Appeals and Supreme Court of California. The questions were raised as follows:

A. Los Angeles County Superior Court (Trial Court). The issue was raised in each count of the cause of action for class action redress. The court disposed of this issue in its judgment sustaining summary judgment on the pleadings as to each count (Appendix A).

B. California Court of Appeals, Second Appellate District. In a brief filed before the

Second Appellate District, dated December 23, 1974, Petitioner herein referred the court to Constitutional, Civil, property, contractual and environmental rights, pleaded in the pleadings as issue and further, to the governmental rights and limitations (perview of police power, immunity and eminent domain), the rights and limitations resulting from Federal funding and Federal regulation, and the unconstitutional taking and damaging appropriatedly raised by the pleadings. The decision disposing of said issue is disposed of by the Appellate Court's decision (Appendix B).

C. California Supreme Court. Petition for hearing, dated February 20, 1975. For disposition, see Appendix C.

REASONS FOR GRANTING THE WRIT.

I. THE DENIAL OF CLASS ACTION TREATMENT IN THE CASE AT BAR--A GROUP WRONG CIRCUMSTANCE--IS A DENIAL OF CONSTITUTIONAL AND CIVIL RIGHTS AND A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the case at bar, class action treatment was denied the Association while at the same time the trial judge permitted the individuals named in the complaint to go forward on an individual basis on the causes of action alleged. The Trial Court's decision, although reversed prior to the San Jose, supra, decision and affirmed after the San Jose decision, assumed a new proportion by reason of the application of the San Jose decision. By reason thereof, the present state of California law denies class action treatment on airport noise actions even though such actions may appropriately qualify for class action treatment in all other respects under California law.

"Class actions," are not such a rare beast as some think; its analogies are so taken for granted,

though, that the relationship is often overlooked. (See NRR:14:C 1-6.) Bills of Peace, Qui Tam, and Quia Timet remedies did not evoke the alarm with which courts approach the so-called "new" class action device.

Corporations are a recognized ongoing device by which a group of persons can sue and be sued through a representative. Criminal prosecutions, and all government litigation in the name of "The King," or "The People" are another ongoing mechanism by which a class--all citizens, or the government officials--may litigate through a representative. Suits in admiralty wherein a ship is libeled are class actions against all who hold interests in the ship. Similarly, any in rem action is a class action. In any property action, our very concept of "property ownership" means that an action against the present owner binds all in privity who take by or through him--the present owner represents all future owners. (Similarly, our custom of vesting title in an individual rather than a family allows that individual to represent at law what otherwise might be sociologically termed "family property.")

When the members of a class are united in a corporation or a governmental unit, there is an authorized procedure for choosing the officials who may litigate and bind the collectivity. We think of the litigation as being carried on by the organization, not by its members, and do not give them notice, chance to opt out, or chance to control the litigation. See, however, Eisen v. Carlise, 48 L.W. 4804. In property actions, we think of the individual present owner in fee simple as the only owner, and do not think of giving litigation rights to other present family members or to representatives of the future owners. In admiralty libels and other in rem actions, there is an attempt to give notice and litigation rights to the individual claimants of the res, but if it is not possible to do so the litigation may go forward.

The City of Los Angeles appears in the case at bar in a representative capacity. It has immense economic capacity because of its representative capacity. Not only does it represent the people of Los Angeles, but also the Los Angeles Airport Department which in turn, represents the interest of its lessees and concessionairs. The Association, IRPA, is a State franchised, duly qualified representative, authorized under California Corporate Law to pursue rights here in issue, for Inglewood residents and owners.

In a Research Contribution of the American Bar Foundation (Foster, "Status of Class Action Litigation", 1974, No. 4), the author observed that:

> "...when certification is denied because of manageability, the result is a failure of justice to the extent that no other adequate remedies are available...class representation is the only conceivably adequate remedy for a group wrong." And: "The class action is, like other remedial devices, nominally neutral with respect to substantive law. But, like all remedial tools, it can have profound effect on a wide variety of essentially substantive relationships. Where, for example, a representative proceeding is the only remedy to be had, its availability makes the whole difference between protection or nonprotection of substantive interests. Again, for enterprises which had long operated on the expectation that only a small fraction of would-be claimants would ever press their claims, a more efficient remedy for enforcing individual claims could have vastly unsettling effects without any change whatever in the underlying substantive law which applied to the individual relationships between the parties." And: "Yet in the largest sense, what the controversy is all about is precisely the kind of matter which traditionally has triggered the exercise of equity jurisdiction: the search for relief when remedies at law are inadequate--in this instance, remedies for group

wrongs which have immemorially lain beyond the reach of effective redress either because individual action got at only a scant fraction of the problem or because the costs of investigation and suit far outweighed the return to the individuals who might have pursued them."

What matters most in equity courts is the practical fairness of the results of its rulings in light of all the circumstances of the case. The complexity of the circumstances involved in the issues of law and fact raised by the pleading in the case at bar, in light of today's needs, make it virtually impossible to properly reach a just result without evaluating the "Group Wrong." This evaluation can be accomplished by class action treatment.

In the San Jose case, supra (decided 4 to 3), Justice Tobriner writing the dissent states:

"...In a one-sided presentation, the majority opinion notes the individual issues which divide the proposed class, but pays little heed to the more significant common issues of law and fact which unite the class; observes the burden of class litigation but overlooks the far greater burden of individual suits; claims to protect the rights of class members to claim damages, but takes from them the most effective means of enforcing that right... The majority opinion speaks of protecting the right of class members to damages, but destroys what may be the only efficient means of redress. The cost and inconvenience of individual litigation may very well dissuade many members of the class from instituting individual suits, and the result of the present decision will then be that such members will recover no damages for loss of market value nor for any other harm. The majority's assertion that subclassification in the present case is incompatible with the maxim that each parcel of land is unique is both historically and logically unsound. This venerable maxim for which centuries

has served the useful, but limited purpose of permitting equitable suits for specific performance of land sale contracts, has nothing to do with class actions. Uniqueness means only that each parcel of land differs in some particular from every other parcel, just as each person differs in some way from every other person. A valid classification, or subclassification, however, does not require that all members of the class possess identical characteristics; it requires only the existence of "issues common to the class as a whole sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court"... indeed, this Court and others have often entertained actions brought on behalf of a class composed of the owners of interest in real property (see e.g. Chance v. Superior Court, 58 Cal.2d 275, 23 Cal. Rptr. 761, 373 P.2d 849; Bauman v. Inslay Investments, 30 Cal. App. 3d 752, 106 Cal. Rptr. 889; Foster v. City of Detroit (6th Cir. 1968), 405 F.2d 138 and Biechele v. Norwalk & Western Ry. Co. (N.D.Ohio 1969), 309 F. Supp. 354... The majority's reasoning is also legally meritless, for it assumes that each diverse issue compels the creation of a separate subclass, an assumption which conflicts with the principal that class litigation requires only that common issues predominate over diverse issues. What the majority opinion overlooks are the manifest benefits arising from the use of a class action to resolve the controvery concerning noise and vibration damage to property in the vicinity of the San Jose Municipal Airport..."

Class actions and class representative actions are not strangers to the judicial process on the airlines, air pilots and airport defense side. (Burbank v. Lockheed, 411 U.S. 624; Air Transport Assn. v. Crotti, 389 F. Supp 58, (1975); American Airlines v. Hempstead, 272 F. Supp 266, 398 F2 369; Airline Pilots Assn. v. D.O.T., 11 Avi 18, 251. In unity there is strength. The most

effective means of protecting a right--is the right to unite. Our forefathers were guided by the principle that "he who devides us will rule us." Access to the courts by the class composed of The Air Transport Association, virtually all U.S. scheduled air carriers, or the class composed of virtually all U.S. Certified Airline Pilots, has been neither prohibited or questioned by the courts in the many judicial proceedings in which they have been permitted to participate. IRPA, the Association in the case at bar, has equally important rights to protect and is equally entitled to access to the courts.

II. -- THE DOCTRINE OF GRIGGS v. ALLEGHENY, DEFINING THE CRITERIA FOR THE TAKING OF AN AIR EASEMENT OVER PRIVATE PROPERTY FOR WHICH PAYMENT OF JUST COMPENSATION MUST BE MADE AS REQUIRED BY THE FOURTEENTH AMENDMENT, SHOULD BE REVIEWED IN LIGHT OF DEVELOPMENTS SUBSEQUENT TO 1962.

In Griggs v. Allegheny, 369 U.S. 84 (1962), this Court decided that: "an adequate approach way is as necessary a part of an airport as is the ground the airstrip itself is constructed.... Without the "approach areas," an airport is indeed, not operable. Respondent, in designing it had to acquire some private property. Our conclusion is that by Constitutional standards, it did not acquire enough." As this Court had previously stated, in U.S. v. Causby, 328 U.S. 256 (1946): "Navigable airspace is that space which does not destroy the beneficial use of the land and does not interfere with the use and enjoyment of the land." Rendering the property unuseable for its purpose in the Constitutional sense constitutes a taking of an air easement for which compensation must be paid. Navigable airspace is the airspace in the public domain--the airspace above the minimum safe altitudes of flight prescribed. Navigable airspace is that airspace whose use by aircraft will not interfere with the use and enjoyment of the property below rendering it unuseable for the purposes intended. Airspace below "Navi-

gable airspace" is private property (see Greenwald/ Branch, "AIRSPACE JURISDICTION" VI Natural Resources Lawyer 3, pp 299-337). Federal regulation prohibits and restricts flight in private airspace and restricts use of Federal funds without ownership of easements necessary for flights in the private airspace. Other judicial decisions have established that Los Angeles operations at LAX invades private Inglewood airspace and a compensable "taking" of Inglewood owners and residents' private property and rights has occurred. Aaron v. City of Los Angeles, (40 Cal App 3d 471, 115 CR 162, 3 ERC 1779 --cert. denied U.S. Sup. Ct., 419 U.S. 1122), Parker v. City of Los Angeles, (118 CR 687). After expensive and protracted litigation in both Aaron and Parker, the trial courts awarded redress to "individuals" for the taking. Los Angeles v. Japan Airlines, 13 Avi. 17, 279, the California Appellate Court notes that in 1967 the airlines agreed to fund $300,000,000. in bonds for further expansion of LAX and the necessity for acquisition of "airspace or air easements or similar interest in land." No action has been instituted by the City of Los Angeles. To acquire the private airspace, it has appropriated over Inglewood or to settle its continuing nuisance, trespass and assault to the homeowners and residents from such use. The case at bar institutes an action for redress in connection with the funds expressly appropriated for that purpose. That such an action is appropriate in the State of California is exemplified by City of Oakland v. Nutter, 13 Cal App. 752 92 CR 347 in which the City brought an action as condemnor to acquire an air easement in the airspace above described real property for airport approaches.

Although Constitutional guarantees provide citizens the right to relief under inverse condemnation, it should not necessarily by the exclusive theory on which an individual party must proceed. The congress of the United States added new section 611 to the Federal Aviation Act; in November, 1969, with the objective of expressly limiting aircraft noise (Public Law 90--411),

Congress also expressed its legislative intent in the language of the National Environmental Policy Act (42 U.S.C. §4321 et seq.) and in the Federal Noise Control Act of 1972 (42 U.S.C. §4901 et seq.). A new age of environmental awareness exists. The limited right of redress articulated by the Griggs case no longer satisfies recognized societal needs.

III. CONSTITUTIONAL "JUST COMPENSATION" IS DENIED WHEN GROUP REDRESS IS UNAVAILABLE FOR GROUP WRONGS.

In the case at bar, the threshold issue which must be proved by those seeking inverse condmenation is: "Does the noise invasion constitute a taking?" In evaluating the noise invasion, the standard that is applied is the doctrine of the "common man."

The evidence required to establish the taking of an avigation servitude and the measure of "substantial impairment of enjoyment and use of the property" is founded not on the impairment experienced by persons of high or unusual sensitivity, but rather by the standards of the common man. (Jackson Municipal Airport Authority v. Wright, Miss. 1970, 232 So. 2d 709; Westhaven v. Eastern Airlines, Inc., D.C. Conn. 1971, 331 Fed Supp. 16 Supplmented 333 Fed Supp. 338 affirmed 470 F 2d 148 certiorari denied, 411 U.S. 965; Luedtke v. Milwaukee County, D.C. Wis., 1974 371 F.Supp. 1040; Shipp v. Louisville and Jefferson County Air Bd., Ky. 1968, 431 S.W. 2d 864 certiorari denied, 393 U.S. 1088.)

In Ferguson v. City of Keene, (11 Avi. 1824), the court held: "The difficult questions which have arisen from attempts to define the requisite elements of the 'taking' bear witness to the unsuitability of dealing with problems of airplane noise by enforcing Constitutionally based claims." While the taking provisions do not undertake to socialize all losses, they do require compensation for taking of property. It is the determination of the issue "has there been a taking" which forms

the line between that which is compensable and that which is noncompnesable. In noise cases, this line is drawn in accordance with the sensibilities of the common man. In Virginians for Dulles v. Volpe, (4ERC 1232 1972) plaintiffs sought, by class action, to enjoin violation of the Fifth Amendment resulting from noise from aircraft operations at the Washington National Airport. Originally, the complaint contained a request for damages which was withdrawn before trial. The judge characterized the case as "basically a private nuisance action in which specific injury must be shown." At the outset, the court stripped the case of its class action character by holding that enough named plaintiffs remained to enable the court to decide the issues presented and render an effective judgment. At the trial's conclusion, however, the court held in part that failure of the named plaintiffs to prove that all persons and properties in the airport area suffered general injury, preclude Fifth and Ninth Amendment claims for injunctive relief, and further, that noise from aircraft operations at airports whose continued use is necessary for public transportation and convenience does not constitute common law nuisance.

The test of liability for nuisance is the effect of the alleged annoyance on persons of ordinary sensibilities, Carter v. Johnson, 209 Cal App. 2d 589, 26 CR 279. Noise which merely offends a hypersensitive person is not a nuisance for which judicial recovery is permitted. To be considered a nuisance, the activity must constitute a substantial interference to a reasonable person, the same test as applied to the "taking" issue in connection with interference by noise with the use and enjoyment of real property. In most jurisdictions, great weight is given to the courts' conception of the interest of the community at large. For example, if a city's prosperity depends on continuation of the enterprise, public policy requires that its noise making activity may

not be enjoined. Therefore, in an action to enjoin transportation noise, the court weighs the individual detriment (interference suffered by the complainant) against the public benefits derived by the community at large (effect on the economy, transportation, etc.).

In Seagraves v. Portland City Temple (13 Avi. 17, 254) decided by the Oregon Supreme Court on May 31, 1974, the court stated: "The cases are legion in which the extent of the interference with reasonable use and enjoyment attributable to noise has been established by the evidence of witnesses describing the character and effect of the noise. To establish this element of nuisance, all that need be established is that the annoyances regarded as harmful to the health or comfort of ordinary people. This can be done by a descriptive account of the manner in which the noise unreasonably interferes with the usual course of living by ordinary people. We hold that the evidence was sufficient to establish the substantiality of defendants' interference with plaintiffs' use of their property." It is to be noted that the language in the Seagraves action for establishing the existence or nonexistence of a "nuisance" is the same language which would be applicable for establishing the existence or nonexistence of a "taking".

In Aitkensen v. Bernard, Inc., 223 Oreg. 624, 355 P 2d 229, the court in applying the "trespass" theory required a showing that "the flights must be at such a height as not to interfere unreasonably with the enjoyment of the surface by the person in possession." It is axiomatic that the Constitutional right to "just compensation in an airport noise action is founded upon the same prerequisite proof to establish the 'taking' 'nuisance' or 'trespass' although the type of relief and defenses in connection with each may vary."

IV. THE CITY OF LOS ANGELES DOES NOT HAVE EXTRA-JURISDICTIONAL POWER OVER INGLEWOOD AIRSPACE.

In the Griggs case, supra, the majority of the

court found that the respondent, which was the promoter, owner and lessor of the airport, was the one who took the air easement in the Constitutional sense. The court noted that Congress provided in 49 U.S.C., §1109 for the payment to owners of airports whose plans were approved by the administrator of a share of "the allowable project costs" including the "costs of acquiring land or interest therein or easements through or other interests in airspace" §1112 (a), (2). It went on to state: "A country that designed and constructed a bridge would not have a useable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?"

In view of the clear mandate of the Griggs case, supra, that the airport is required under Constitutional standards to acquire air easements, and the $300,000,000 in funding provided in 1967 for this express purpose (City of Los Angeles v. Japan Airlines, supra) the class action mechanism became not only appropriate, but mandatory if the responsibility of the City of Los Angeles was to be justly administered and discharged. The action Anderson v. Souza, 38 Cal 2d 825 243 P 2d 497, was instituted by owners of real property located near a private airport to enjoin the operation of the airport on the ground that it was a nuisance and to recover damages therefore. Because it was a private airport, the court distinguished it from a public (municipal) airport on the ground of its inability to condemn property for its use. The court stated: "The owners and operators of such an airport notwithstanding that they are engaged in a legitimate business, the encouragement and furtherance of which is a publicly--declared policy of our legislature... must nevertheless conduct it with due regard for the rights of others, and if because of location the operation of such a business will result in depriving others of their

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property rights, it cannot be permitted, for to do so would in practical effect condemn the property of others in violation of Constitutional guarantees." ...An airport is not a nuisance per se, but that it may become a nuisance either because of unsuitable location or a proper operation or both, has been clearly decided. In the case at bar, the City of Los Angeles, although licensed to conduct its airport, is without the power of eminent domain and without police power in the airspace of Inglewood residents and property owners. The dilemma created by this unusual circumstance of taking without authority so to do and the conduct of a nuisance, trespass assault and the commission of a breach of the contractual obligation to pay for the air easements taken, creates a unique circumstance that should be the subject of judicial determination by utilization of the mechanism best suited to the problem--the class action.

CONCLUSION.

It is respectfully submitted that for the reasons stated a writ should issue to review the decision of the California Court of Appeals.

DATED: July 9, 1975. Respectfully submitted,

GREENWALD AND BAJM

By _____
ALVIN G. GREENWALD

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